IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1216 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SARVAGNA NAVINCHANDR GODIAWALA

Versus

STATE OF GUJARAT

Appearance:

MR AJ PATEL for the Petitioner.

Mr.M.K. Dagli, Assistant GOVERNMENT PLEADER, for Respondent No. 1-2

MR JITENDRA M PATEL for Respondent No. 3,4/1-6

..... for Respondent No. 4

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 24/10/2002

ORAL JUDGEMENT

By filing this petition, the petitioner has prayed for the issuance of a writ of certiorari for

quashing and setting aside the orders dated 12.10.1998 and 25.1.1999/1.2.1999 passed by the Deputy Collector, Ahmedabad and the Additional Chief Secretary (Appeal), respectively, produced by the petitioner at Annexures 'E' and 'G' to the petition.

The petitioner has challenged the order passed by the Additional Chief Secretary (Appeals), Revenue Department, Gujarat State, which is at Annexure 'G' to the petition (page 32 of the compilation). By the impugned order, the Secretary has remanded the matter to the Collector for taking fresh decision as per the observations made in the remand order.

The petitioner is a purchaser of agricultural land. The said land was purchased by the petitioner by way of registered sale deed dated 27.4.1981. On the basis of such sale, even a revenue entry was also mutated in the name of the present petitioner as purchaser on 5.5.1981. The revenue authorities were aware about the aforesaid transaction since entry was mutated in his name. However, for a considerable time, proceedings on the ground that the transaction in question is void in view of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 were not initiated by the revenue authorities.

Thereafter, on behalf of the seller, after more than 17 years, an application was made to the Collector, for taking proceedings under the Fragmentation Act and for summary eviction of the petitioner-original petitioner. The Collector had set aside the sale on the ground that the same is hit by the provisions of the Fragmentation Act and order of Summary Eviction was passed against the petitioner under Section 9(3) of the said Act. The said order was challenged by the petitioner by way of revision application before the Additional Chief Secretary (Appeal). The Additional Chief Secretary came to the conclusion that the transaction in question being void, the same can be challenged at any point of time and, therefore, the contention on the part of the petitioner, to the effect that proceedings should not have been initiated after a period of 17 years, was negatived by the Secretary. However, he remanded the matter for the limited purpose of giving an opportunity to the petitioner to satisfy the authority whether, in between, the petitioner has made any development on the disputed property, as well as to find out whether any other heirs are required to be heard, etc. The said orders are challenged by the petitioner. The petition is admitted and the impugned

order is stayed by the Court.

Mr.Patel for the petitioner argued that initiation of proceedings after a period of 17 years is bad. There is no evidence for coming to the conclusion that any notice was served to the original owner regarding the concerned entry, treating the land in question as a fragment, as required by Section 6(2) of the Act. He also submitted that, in any case, at the instance of the present respondent No.3, proceedings should not have been initiated, as, the seller, after having taken full consideration, cannot be permitted to initiate proceedings.

On behalf of the State Government, the order of the Secretary is supported by Mr.M.K. Dagli, learned AGP. Mr.J.M. Patel, who is appearing for the original seller, has also supported the said judgment, and he also submitted that it cannot be said that the seller has no locus standi to challenge the said transaction.

Mr.J.M. Patel, appearing for the respondent-seller, placed reliance on the decision of this Court in Patel Jividas Trikamdas & Ors. v. District Collector, Mehsana & Ors., XXXVII(2) GLR 688, wherein this Court has held as under :-

> " ... ...
>
> 3A. The learned Counsel Mr.Pahwa appearing for the petitioners has raised the following contentions :
>
> (1) That the delay in quashing the sale transaction is more than 19 years and therefore, it is unreasonable;
>
> (2) That the land in question is not declared as fragment under Sec. 7 of the Act and no such notice is ever given to the petitioners; and
>
> (3) That equity is created in favour of the petitioners as they have purchased the land in question in 1968 and they have spent huge amount and that is the main source of their livelihood of the petitioners.
>
> The aforesaid three contentions are inter-connceted and, therefore, they are

being dealt with simultaneously. In support of the first contention, the learned Counsel has also placed reliance on the two decisions of this Court. Firstly, he has placed reliance on a decision rendered by this Court in Special Civil Application No.4583 of 1985 decided by a single Judge (Coram : R.C. Mankad, J.) on 29.2.1988. In the said decision, it was held by this Court that eviction after 24 years of the sale transaction even in violation or breach of Sec. 9 of the Act would not be justified. Therein reliance was placed on a decision of this Court in Ranchhodbhai V. State, 1984 {XXV(2)} GLR 1225. In that case, it was noticed that the transaction which had taken place in 1960 and the mutation entry in respect whereof was made in 1966 was sought to be set aside in 1984. Thus, the transaction was sought to be held to be illegal and the petitioner in that case was sought to be evicted after 24 years of transaction. It was found in that case that the action of the authority was not justified. In the aforesaid decision, it was also observed by this Court that even assuming for the sake of argument that the transaction was in violation or in breach of Sec. 9 of the Act, no action can be justified after a lapse of long period of 24 years. Therefore, following the decision of this Court in Ranchhodbhai's case (supra), it was held that the authorities below were not justified in holding that the transaction in question was bad in law and evict the petitioners in that case.

4. In Ranchhodbhai's case (supra), this Court had held that upon appreciation of the peculiar facts of that case, it had got to be held that the power exercised by the concerned authority under Sec. 9 of the Act was at grossly belated stage and there was unreasonable delay in exercise of power and that exercise of power would be ex facie unreasonable, unjust and illegal. It was further held that transfer without permission of the Collector was sought to be questioned after 7 years under the Act and in the meantime, the petitioner in that

case had constructed house on the land and had incurred expenses. It was held that exercise of power under Sec. 9 at a grossly belated stage against the transfer without permission of the Collector was illegal. Reliance was placed by this Court (Coram : S.B. Majmudar, J.) on a decision of the Hon'ble Apex Court rendered in the case of State of Gujarat v. Patel Raghav Natha, 1970(1) SCR 335 : 1969 GLR 992 (SC).

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6. It is a settled proposition of law that any action, transaction, decision or order which is illegal and void ab initio is to be treated as non-est. The validity of such an illegal non-est order could be questioned in any proceedings at any stage by anybody. The very nature of the non-est order in its effect does not create any right, title or interest. It being a void, it confers not any status or any right. With the result, such non-est or illegal order, decision, transaction or action would be for all purposes ineffective and of no consequence in the eyes of law. This proposition of law is very well explained, examined and expounded by catena of judicial pronouncements. The view being taken by this Court at this juncture is reinforced by a decision of the Hon'ble Apex Court in the case of State of Orissa v. Brundaban Sharma, 1995 Supp. (3) SCC 249. In that case, the question had arisen under the Orissa Estate Abolition Act, 1951. Section 38-B was added in 1973 in the said Act. The Board of Revenue under the said Act had exercised power under Sec.38B after a period of 27 years. Thus, the confirmation of tenancy rights by the Tehsildar without obtaining prior confirmation of the Board of Revenue was questioned after 27 years. It was found in the said decision that the order of the Tehsildar was void. The Board of Revenue was, therefore, justified in quashing the said order even after 27 years had lapsed since the grant of Patta by the Tehsildar in favour of the party. It was laid down

by the Hon'ble Apex Court that once the order is found in violation of the provisions of the law, it is illegal and void and, therefore, it is non-est for all purposes. It was, therefore, held that it cannot be said that the Board of Revenue exercised the power under Section 38-B of the said Act after an unreasonable lapse of time. In the circumstances, the exercise of revisional power under Sec. 38-B by the Board of Revenue after 27 years was found legal and valid and it was further held that it brooked no delay. It was also held by the Hon'ble Apex Court that the order passed by the Tehsildar without the confirmation by the Board which was a requirement of the law was non-est and a non-est order is void and it confers no title and its validity can be questioned or invalidity be set up in any proceedings or at any stage.

... ..."

In support of his contention, Mr.A.J. Patel, who is appearing for the petitioner, cited various decisions.

Firstly, Mr.Patel relied on the decision of this Court in Ranchhodbhai Lallubhai Patel v. State of Gujarat & Ors., XXV(2) GLR 1225, wherein this Court held as under :-

" ... ...

3. Mr.Sanjanwala learned advocate for the petitioner, amongst others, submitted that after lapse of almost ten years, the Deputy Collector had set aside the transaction in favour of the petitioner and had ordered summary eviction. That such order passed after gross delay was unjustified, and that the said submission was wrongly rejected even by the revisional authority.

4. Now, it is obvious that the authorities under the Act have been enjoined to pass proper orders under sec.

9 for declaring the transactions contrary to the said Act to be null and void and also to pass consequential orders of fine as well as summary eviction. But the said statutory powers like any other statutory powers have to be exercised within reasonable time. If that concept is kept out, any statutory powers would be exercised after a number of years or decades. In the meantime, the affected parties would have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. If such powers can be exercised after unduly long delay. On the peculiar facts of this case, it has got to be held that the power exercised by the concerned authorities under Sec. 9 was at grossly belated stage and as there was unreasonable delay in exercise of that power, the exercise would be ex facie unreasonable, unjust and illegal. It may be recalled that the petitioner purchased a part of the block on 2.1.1967 by a registered sale deed. It is true that ignorance of law is no excuse and merely because the petitioner pleaded that he was ignorant of the legal requirement of obtaining prior permission of the collector the same cannot stand in good stead to him. Consequently, if the authorities would have been vigilant enough for enforcement of the provisions of the Act and had initiated proceedings under sec. 9 at the earliest, the petitioner would have no defence in such proceedings. But on the facts of this case, the situation is entirely different. The authorities acting under the Act did not initiate any proceedings against the petitioner and opponent No.3 for 7 long no of years. In the meantime, the petitioner who had purchased the land for the purpose of putting up a residential house, spent a large amount of Rs.25,000/- and constructed a residential house with facilities of latrine, bathroom and a store room. It is obvious that when no proceedings were initiated against them for a long time, there could arise a reasonable belief for the petitioner that there was nothing wrong with the sale deed under which he had

purchased the land and he had become full owner of the land. He could never have dreamt that after 7 years, he would be presented with a show cause notice under sec. 9. During that time, the petitioner had irretrievably changed his position to his detriment. Such an inaction on the part of the authorities exercising powers under the Act for a number of years and waking up one fine morning after 7 years by issuing notice to the concerned parties for showing cause why the transaction entered into by them should not be declared as null and void. has got to be held, on the facts of this case, to be quite unreasonable. It is also to be appreciated that the Deputy Collector passed the order of summary eviction against the petitioner in 1974 almost 10 years after the date of the original transaction of 1967. Hence, the exercise of such power would be unjust on the facts of this case. If any authority were needed in support of my conclusion to which I have reached on the facts of the case, it is supplied by the decision of the Supreme Court in Mansaram v. S.P. Pathak and Others (Civil Appeal No.1262 (N) of 1978, decided by D.A. Desai and R.B. Misra, JJ. on 29.9.1983). D.A. Desai, J. speaking for the Supreme Court has made the following pertinent observations :

> "Where the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner and the reasonable exercise of power inhers its exercise within a reasonable time. This is too well established to need buttressing by a precedent. However, one is readily available in State of Gujarat v. Patel Raghav Natha and Others (1970) 1 SCR 335".

It is true that no period of limitation is laid down by the said Act indicating as to within what period the concerned authorities can initiate proceedings under sec. 9. It is also true that power given to the authorities is coupled with duty to act as per the provisions of sec. 9 if

power under sec. 9 can be validly invoked. But that does not mean that power can be exercised at any time, may be after years or decades. Exercise of power has to be justified on the facts of each case and if on the facts of a given case, it is found that exercise of power after lapse of sufficiently long period between the impugned transaction and the date of exercise of that power would be arbitrary and unreasonable due to the fact that in the meanwhile parties had changed their position irretrievably oblivious of any possibility of future action by the authorities functioning under the Act on account of prolonged inaction on the part of these authorities and any attempt to put back the clock would result in irreparable injury to the concerned parties, then such exercise has to be treated to be unjust and illegal. In that view of the matter, as seen above, on the facts of this case, the exercise of the power under sec. 9 against the petitioner would be unreasonable and arbitrary. Only on this short ground and without going into other contentions which are sought to be canvassed by Mr.Sanjanwala in support of the petition, the petition will have to be allowed.

... ..."

In Rathod Nayamatkhan Ahmedkhan v. M.K. Dass, 1998 (2) G.L.H. 459, the orders of the Assistant Collector and the State Government holding the transfer of land as illegal and void was set aside. In the said decision, this Court (Coram : M.S. Shah, J.) placed reliance on the decision of this Court in XXV (2) GLR 1225 (supra) and on an unreported decision of the Honourable Supreme Court of India, dated 22.8.1996 in Civil Appeal No.5023 of 1985 (Mohemad Kavi Mohamad Amin v. Fatimabai Ibrahim).

In Jiviben Wd/o Kalaji Bapuji v. State of Gujarat & Ors., 1998 (2) G.L.H. 556, this Court held as under :-

" ... ...

6. It appears to the Court that the

decision of this Court in the case of Patel Jividas (supra) prima facie supports the petitioner's case. However, in an unreported decision on 22.8.1996 in Civil Appeal No.6023 of 1985 (Mohemad Kavi Mohamad Amin v. Fatimabai Ibrahim), the Apex Court has held that where no time limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at anytime; such power has to be exercised within a reasonable time. In the aforesaid decision dated 22.8.1996, the Apex Court has also approved the ratio of the judgment of this Court speaking through Hon'ble Mr.Justice S.B. Majmudar (as His Lordship then was) in Special Civil Applicaiton No.2770 of 1979 (State of Gujarat v. Jethmal Shaowandas Shah) decided on 1.3.1990 that the power under Section 84 C of the Bombay Tenancy and Agricultural Land Act (hereinafter referred to as "the Tenancy Act") should be exercised within a reasonable time.

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10. In view of the above, there is no reason why the same general principle with the same exception as aforesaid should not apply to the exercise of powers under the provisions of the Fragmentation Act. Hence, the ratio of the judgment of this Court in the case of Ranchhodbhai Lallubhai Patel v. State of Gujarat & Ors., 1984 (2) GLR 1225 should be treated to have been only modified to the effect that it is subject to the exception that plea against exercise of power beyond reasonable time cannot be availed of by a person who is guilty of fraud or supersession of material facts, when such fraud or suppression comes to the notice of the authorities after a long lapse of time.

... ..."

In Jesus and Mary Gujarat Society v. Lakhabhai Arjanbhai, XXXIX (2) GLR 1626, this Court held as under :-

" ... ...

6. So far as the question of delay is concerned, I do not find that it is a case in which there is a non est order as was the case in the case of Patel Jividas Trikamdas v. Collector (supra). In that case, the Court had come to a conclusion that there was violation of Sec. 8 and it is clearly discernible from the facts of Patel Jividas Trikamdas v. Collector (supra) that it was not a case in which the land had been purchased by the petitioner for any public purpose. It was a simple transaction by one individual to another individual. Nobody had pleaded the case of public purpose and the protection of Sec. 8A. The Court found that it was a simple case of violation of Sec. 8 and in this view of the matter the Court held that the transaction was non est. Here is a case in which on one hand there is a Society registered as a Public Trust claiming the protection of Sec. 8A and on the other hand an individual who seeks to approbate and reprobate, to play fast and loose, to blow hot and cold in the same breath, to eat the cake and have it too attempting to take an unfair advantage of law averse to the equity. Be that as it may, the fact remains that the permission which had been granted by the Collector in the year 1975 to the petitioner-Society, in the facts of this case, cannot be said to be non est and it has already been held that such permission was in order and the impugned orders Annexures 'L' and 'M' had been passed in absence of any material, without any evidence on the bald subjective satisfaction. In such a fact-situation, the delay of 6 years in initiating the proceedings should also vitiate the proceedings taken against the Society.

7. The upshot of the aforesaid discussion and adjudication is that the Special Civil Application succeeds and the same is hereby allowed. The impugned orders Annexure 'L' dated 1.6.1982 and and Annexure 'M' dated 6.12.1982 passed by the Assistant Collector and the Secretary

(Appeals), Revenue Department, Government of Gujarat respectively cannot be sustained in the eye of law and the same are hereby quashed and set aside. Rule is made absolute. No order as to costs.

... ..."

In the decision dated 20.8.1998 rendered in Special Civil Applicaiton No.6265 of 1998, this court (Coram : R. Balia, J.) held as under :-

... ...

1. This petition is by legal heirs of the transferor of land in question. The land in question was transferred more than two decades ago. The proceedings for setting it aside or declaring the transaction as null and void by the legal heirs of the transferor since deceased sought to be initiated on the ground that transfer made by their predecessor in title was void in view of the provision of the Bombay Prevention of Fragmentation Act, 1947. The final authority has rejected the application on the ground that it is not inclined to entertain such a belated application in exercise of his powers.

2. In the facts of the case, as the petitioners are trying to take advantage of their own acts after a lapse of more than two decades, I am not inclined to entertain this petition in exercise of powers under Article 226 of the Constitution. Dismissed summarily.

... ..."

In Patel Ratilal Maganbhai v. State of Gujarat, (LPA No.1086 of 1999) decided by a Division Bench of this Court (Coram : B.C. Patel and Jayant Patel, JJ.) on 23rd January, 2002, this Court rendered a decision on a matter which is on all fours with the present petition. In that decision, the appellants-original petitioners were the legal heirs of one Maganlal Patel. The said Maganlal sold the land to respondent No.3 therein by way of a registered sale deed after receiving full consideration, in 1980. Revenue entry was also accordingly mutated. In 1996, the Deputy Collector

issued notice to the transferee, i.e. respondent No.3 therein. Later on, the Deputy Collector withdrew the show cause notice.

The appellants therein filed a revision after a period of about 17 years against the order of the Deputy Collector.

The appellants therein unsuccessfully challenged the decision of the State Government, dismissing the revision, by filing Special Civil Application. Aggrieved by the decision in the Special Civil Application, the aforesaid Letters Patent Appeal was filed.

On behalf of respondent No.3 therein, it was submitted as under :-

> " ... ...
>
> 8. On behalf of respondent No.3, Mr. A.J. Patel has submitted that the voluntary sale came to be executed by the father of the appellants and the deceased has received full consideration and executed the sale deed and has enjoyed the amount for his benefit and the benefit of the family and for a period of 16 years no whisper is made by the deceased or the appellants herein who are legal heirs of the deceased regarding transaction for sale. He further submitted that both the authorities have found that the block is not divided and even if the block is divided the permission is granted and the show cause notice is withdrawn. He further submitted that when the deceased transferor himself is a party to the voluntary sale and for about 16/17 years he has not challenged the legality and validity of the sale and when he has received the full consideration, the sale cannot be declared void at his instance or at the instance of the appellants who are legal heirs of the transferor, that too when neither the deceased nor the appellants have chosen to file appropriate proceedings of filing suit for declaring the sale as void and therefore, in his submission this is a fit case of abuse of process of law and this court should not permit the party to invoke the extraordinary equitable jurisdiction

under Article 226 of the Constitution who themselves are admitting that they have committed wrong and have pocketed the undue benefits pursuant to transaction of sale which is under challenge.

... ..."

It is also pertinent to extract paragraphs 16 and 17 of the aforesaid judgment in the Letters Patent Appeal :-

" ... ...

16. Mr.A.J. Patel has drawn our attention to the judgment of the Division Bench (Coram : Mr.K.G. Balakrishnan, CJ & Mr.Justice J.N.Bhatt) dated 2.9.1999 in Letters Patent Appeal No.1153/98 in Special Civil Application No.6265/98 in the case of legal heirs of Mithabhai Mavjibhai v. State of Gujarat. Before the Division Bench the aforesaid matter was under the present Act itself and the Division Bench speaking through K.G. Balakrishnan, CJ observed as under :-

"We have heard the appellants' counsel. The present appeal is filed by the legal heirs of the original transferor. The counsel contended that the sale deed executed contrary to the provisions contained in the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 is a void transaction and therefore, no rights will flow from such a transaction and the Collector was justified in setting aside the same even after a period of 21 years. It is important to note that the present challenge is made by the heirs of the original transferor. The original transferor accepted consideration and must have made the transferees believe that the transaction was in accordance with law. Therefore, the present appellants who are the legal heirs of the original transferors cannot be heard to say that they are

> entitled to the benefit of such a transaction which was opposed to law."
>
> 17. We are of the view that the aforesaid judgment of the Division Bench of this court is squarely applicable to the facts of the present case.
>
> ... ..."

Ultimately, the appeal was dismissed by imposing costs of Rs.5,000/-.

The well-known maxim "In Pari Delicto Potior Est Conditio Possidentis" {in a case of equal or mutual fault between two parties, the condition of the party in possession (or defending) is the better one, and where the fault is mutual, the law will leave the case as it finds it), in my view, is applicable to the facts of the present case.

Considering the aforesaid aspects, in my view, initiation of proceedings, after such a long time, cannot be permitted and the Collector has committed an error of law in setting aside the transaction on the basis of the application made by respondent No.3, who, after having received the full consideration, thought it fit to challenge the said transaction after 17 years. In my view, a void order is also required to be challenged, as, it is submitted by Mr.A.J. Patel that the petitioners have also become owners by way of adverse possession. It is also not in dispute that even the Revenue Authorities were aware about the said transaction in view of the entry which was posted in 1981, but, the authorities had not thought it fit to take any proceedings for about 17 years.

Under these circumstances, in my view, proceedings are not required to be conducted at the instance of the respondent No.3. Even otherwise, the land in question is situated in T.P. Scheme, which is introduced and the same is now in residential zone. In that view of the matter, even rigour of Act, to an extent, is watered down. This being in residential zone in the Town Planning Scheme, the land can be converted into N.A. use.

Considering all the aforesaid aspects, in my view, the initiation of proceedings under the

Fragmentation Act itself is bad, as no proceeding was required to be initiated at all in view of such long passage of time. In my view, therefore, the initiation of proceedings itself is bad on the aforesaid grounds, as indicated above. Under these circumstances, no useful purpose would be served by keeping the proceedings pending by upholding the order of remand passed by the Additional Chief Secretary (Appeal). Under the circumstances, the petition is allowed. The impugned order of the Additional Chief Secretary (Appeal) (Annexure 'G') as well as the order of the Deputy Collector (Annexure 'E') are quashed and set aside and the proceedings initiated against the petitioner under the Fragmentation Act is ordered to be terminated forthwith.

Rule is made absolute accordingly, with no order as to costs.

(P.B. Majmudar, J.)

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(apj)